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NO. 80-2054

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN BUETTNER-JANUSCH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

Page

ARGUMENT.....1

CONCLUSION.....5

TABLE OF CITATIONS

Cases

Arkansas v. Sanders, 442 U.S. 753 (1979).....3,4
Coolidge v. New Hampshire, 403 U.S. 443, 474 (1971).....4
Payton v. New York, 445 U.S. 573, 587 (1980).....4
Robbins v. California, ___ U.S. ___, 49 U.S.L.W. 4906 (No. 80-148, July 1, 1981).....3,4
United States v. Matlock, 415 U.S. 164 (1974).....2,3
Walter v. United States, 447 U.S. 649 (1980).....3,5

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This Reply Brief is respectfully submitted in further support of Dr. John Buettner-Janusch's Petition for a Writ of Certiorari.

1. The Government's discussion of the third-party consent doctrine highlights the significance of the questions presented in this case. According to the Government's theory, Macris and Jolly had the right to grant consent because they had lawful access to the laboratory (G. Br. 4-5).* This proposition would expand the doctrine of third-party consent significantly (See Petn. at 16-18). In support of its novel theory, the Government quotes from a sentence in *United States v. Matlock*, 415 U.S. 164 (1974), which states that common authority sufficient to permit the granting of consent rests upon "mutual use of the property by persons generally having joint access or control for most purposes" (G. Br. at 5). The Government, however, fails to quote the rest of the sentence which goes on to explain that common authority cannot be found unless it is reasonable to conclude that the person giving consent had "the right to permit the inspection in his own right." *United States v. Matlock*, 415 U.S. 164, 171, n. 7.

Because the courts below agreed with the Government and thought the question irrelevant, neither court made findings on whether Macris or Jolly had the authority to exercise access to the laboratory or the equipment "in his own right". However, the record clearly shows that whatever access Macris and Jolly may have enjoyed, they enjoyed only because Professor Buettner-Janusch chose to exercise the authority that was his to exercise. The laboratory in question was Professor Buettner-Janusch's workplace, built especially for him in order to lure him to New York University (App. 4).** He decided what research projects were done there; and he decided who had access and for what purpose (A. 698a).***

Professor Buettner-Janusch agreed to give Jolly access to the laboratory so that he could walk to his own adjoining workplace. Jolly made use of some of the less sophisticated

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*"G. Br." refers to the Brief in Opposition to Certiorari.

**"App." refers to the Appendix to Professor Buettner-Janusch's Petition for a Writ of Certiorari.

***"A" refers to the Joint Appendix filed in the Court of Appeals.

equipment in Dr. Buettner-Janusch's laboratory but only because Dr. Buettner-Janusch allowed it (App. 4). With regard to the fume hood (from which all of the controlled substances were seized), no one was allowed to use that equipment without permission of the person whose experiment was then being conducted (A. 698a). The Government has never claimed, and there is no evidence, that Jolly was conducting such an experiment or that he had permission from anyone who was. Indeed, Jolly could not recall using the fume hood in all of 1979 (the year the Government searched the laboratory) (App. 4). As an undergraduate laboratory assistant, Macris also had access to the laboratory, at least until he took a leave of absence from NYU, one month before the Government's search. He had permission to use the equipment, however, only when he was performing experiments "at [Professor Buettner-Janusch's] request" (App. 5). Thus, although Macris and Jolly may have had lawful access to the laboratory and hence to the equipment, neither one had the right to exercise control over the laboratory or the equipment "in his own right" as is required by *United States v. Matlock*, 415 U.S. 164, 171 n. 7 (1974).

2. The Fourth Amendment requires a separate justification for each separate governmental search – that is, for each separate intrusion into a protected area of privacy. *Walter v. United States*, 447 U.S. 649 (1980). *Arkansas v. Sanders*, 442 U.S. 753 (1979) and *Robbins v. California*, ___ U.S. ___, 49 U.S.L.W. 4906 (No. 80-148, July 1, 1981), both follow from and reinforce this principle. These cases hold that probable cause to stop and search an automobile does not, *ipso facto*, mean that there is sufficient justification to search and seize all the containers that may be found in the car. The plurality in *Robbins* held that the separate search there required a warrant. Even Justice Stevens, who dissented and who would not have required a warrant, would have required a separate showing of probable cause before the officers could lawfully open the containers found in the vehicle. 49 U.S.L.W. at 4913.

So too here, the opening of the closed plastic containers was a separate search, different from and more intrusive than the entry into the laboratory and the opening of the fume hood. Before he opened the containers, the DEA chemist may have seen things in "plain view", that is, he may have obtained information without actually conducting a "search". Indisputably not in "plain view", however, was what the chemist discovered upon opening the jars – the smell of toluene. Before he opened the jars, and before he smelled toluene, according to the chemist's testimony, he did not know what was in the jars (A. 769a). Indeed, he had not even decided to seize the jars and subject their contents to analysis at the government laboratory (A. 775a). He did not claim, nor did the courts below find, that prior to opening the jars he had probable cause to believe that they contained methaqualone or any other controlled substance. In its brief in opposition, the Government concedes that it was only the odor of toluene discovered *after* the jars were opened that "gave [the chemist] probable cause to believe that the white substance in the containers was methaqualone" (G. Br. 7).

This case, then, presents the issue whether a search of these jars in a scientific laboratory may be justified on some basis less than probable cause. An affirmative answer would violate not only *Sanders* and *Robbins* but also one of the most fundamental principles of the Fourth Amendment.

3. This Court has taught that an analysis of a person's legitimate expectation of privacy in an object or in an area, depends on the circumstances. *Payton v. New York*, 445 U.S. 573, 587 (1980); *Coolidge v. New Hampshire*, 403 U.S. 443, 474 (1971). Who is the person, what is the object, where is the place? A research scientist who stores substances in a university laboratory, in tightly closed plastic containers, inside sophisticated scientific equipment has a different legitimate expectation of privacy in the chemical composition of the substances than [to use an example the Government finds appealing, (G. Br. 8)], a layman who is selling powder in glassine envelopes on the street.

In this case, Professor Buettner-Janusch took reasonable precautions to protect his interests in the privacy of the chemical composition of the substances. The chemicals were stored in tightly closed jars, in an enclosed piece of scientific equipment specifically designed to keep the chemicals secure (See App. F). These precautions were, in fact, effective. Upon entering the laboratory, looking around, and opening the fume hood, even an expert DEA chemist could not tell what was in the jars (A. 769a). If he had been able to know what the chemicals were simply by looking at them and the surrounding materials, he would not have had to engage in the further searches which are at issue here – opening the jars and subjecting the contents to an intensive chemical analysis at a government laboratory. The clear teaching of *Walter* is that the search at the government laboratory, which intruded in a significant additional way upon Professor Buettner-Janusch's legitimate expectation of privacy, was unlawful because it was not conducted pursuant to a warrant.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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